United States Court of Appeals

for the Second Circuit

SUPPLEMENTAL BRIEF

75-1359

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UNITED STATES COURT OF APPEALS

SECOND CIRCUIT : NEW YORK

JAN 20 1976

UNITED STATES OF AMERICA,

-against-

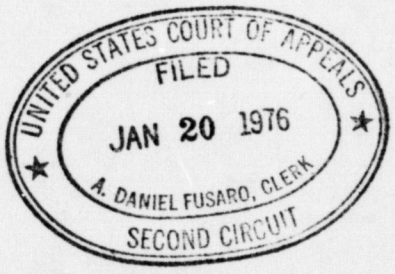
No. 75-1359

HERBERT SPERLING,

DEFENDANT-APPELLANT,

DEFENDANT-APPELLANT'S PRO SE SUPPLEMENTAL MEMORANDUM IN SUPPORT OF HIS BRIEF-IN-CHIEF

DATED: This 16th day of January, 1976.



Respectfully submitted,

Herbert Sperling

Herbert Sperling #78271
Defendant-Appellant, pro se
PO Box PMB
Atlanta, Georgia 30315

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UNITED STATES COURT OF APPEALS

SECOND CIRCUIT : NEW YORK

UNITED STATES OF AMERICA,

-against- No. 75-1359

HERBERT SPERLING,

DEFENDANT-APPELLANT.

DEFENDANT-APPELLANT'S PRO SE SUPPLEMENTAL MEMORANDUM IN SUPPORT OF HIS BRIEF-IN-CHIEF

The defendant- appellant, Herbert Sperling, filed timely pro se briefs with this Court on December 3, 1975, appealing from the lower court's order denying his motion to vacate an order granting the government's ex parte application for nolle prosequi of three counts remanded by this Court for retrial; to grant him a retrial thereto; and/or to amend the order to read dismissed with prejudice because of the appellant's many efforts to obtain a prompt and speedy retrial to the reversed and remanded counts. (See Brief-In-Chief, p. 4, with references to appendices therein).

The appellant now submits, pursuant to Rule 31(a), Rules Of Appellate Procedure, the instant Supplemental Memorandum in answer to the government counsel's Reply Brief In Opposition which was submitted on or about January 6, 1976.

POINT I

THE GOVERNMENT DOES NOT SERIOUSLY DISPUTE THE APPELLANT'S RIGHT TO HAVE THE LOWER COURT AMEND THE EXISTING ORDER TO READ "DISMISSED WITH PREJUDICE", RATHER, IT ENDEAVORS, THROUGH A PLAY OF SEMANTICS, TO PERPETUATE THE DENIAL OF DUE PROCESS BY POINTING TO NON-EXISTENT PROCEDURAL BARS AND, THROUGH THE SAME ACROBATIC DISPLAY OF SEMANTICS, CONFUSE THE COURT

The appellant respectfully submits to this Honorable Court that the government counsel through confusion and/or misapplied concepts has resorted to the prevalent existing local policy that seems to encourage any expedition into semantic distortions towards narcotic cases. Distortions that by their very nature are calculated to further deny the appellant whatever rights he may have under the due process of law clause to the National Constitution.

Examples of the government counsel's confusion and subsequent misleading and untruthful statements, to this Court, can be gleaned from the following:

The government makes the naked assertion that "Sperling points to nothing in the record which suggests that the Government should have concluded that he would object to the dismissal of the charges against him by order of nolle prosequi."(Reply Brief, p.9). Ignoring, inter alia, appellant's pro se motion for a speedy retrial (Appendix, 3); his letter to the lower court wherein he points out that:

> "I am acting as my own attorney, and proceeding in forma pauperis. I believe I am entitled to be informed as to what has been done, or has not been done, with respect to setting my case on the calendar for retrial." (Appendix, 11);

his petition for a writ of mandamus to this Court (Appendix, 13); his letter to this Court (Appendix, 16); and his letter to Judge Bonsal requesting a date for retrial (Appendix, 28). Surely, any literal reading of these appendices would convice the average man of intelligence that indeed "Sperling.....would object to the dismissal of the charges against him by order of nolle prosequi."

The government counsel infers that United States V. Yagid (Docket No. 75-1288 (2nd Cir. January 5, 1976)) is dispositive of appellant's claims (Reply Brief, p. 7, 1st ft.n.) then dedicates one and a half pages, in its second footnote, to say that Yagid "has no application here." (id., at p. 8). Clearly, the government counsel is sorely confused! However, the real danger lies in the fact that said confusion may mislead this Court.

The issue as to the appellant filing a timely Notice Of Appeal is disposed of by Exhibit A appended hereto which clearly shows that notwithstanding the lower court's denial of appellant's motion on July 24, 1975, notice thereof was not mailed to him until August 12, 1975. (But see Exhibit B, appended hereto, i.e., Notice Of Appeal).

The government counsel is hardly in a position to question the appellant's timeliness when pursuant to Rule 31(a) of the Rules of Appellate Procedure they failed to file their Reply Brief "within 30 days after service of the frief of the appellant." This is evident by their reference to Yagid, decided in this Court on January 5, 1976; appellant's briefs were submitted on December 3, 1975.

Assuming, arguendo, that under the Rules Of Appellate Procedure, dealing with criminal appeals, the appellant's Notice Of Appeal was inexcusably out of time, then this appeal could, and should, be treated as governed by the Rules Of Appeals In Civil Cases, in which event the Notice Of Appeal would have been well within the 60 day period that prevails in civil cases where the government is a party (Rule 4(a), Rules Of Appellate Procedure).

As the government counsel concedes in the Reply Brief, at p. 3, the appeal here is not from the order of nolle prosequi, but from the lower court's order denying the appellant's motion. Regardless of the name or caption that the appellant gave to the motion the nature of the motion is determined by its contents, and particularly, by the relief sought. Appellant's motion is in effect a petition for declaratory judgment and injunctive relief, (see 28 U.S.C., Sec. 2201,and Rule 57, Rules Of Civil Procedure), in that the ultimate relief sought is a declaration by this Court that the appellant cannot be retried on Counts Eight, Nine, and Ten, by

virtue of the speedy trial guarnatee of the Sixth Amendment and the sanctions of Rule 6 of the Southern District. There is nothing new or novel in treating an action as a civil case, even though it relates to a criminal matter. For instance, habeas corpus and Section 2255 proceedings are civil actions even though they relat to criminal issuea.

The above rationale would be responsive to the teaching in Haines V. Kerner (404 U.S. 519, 30 L.Ed.2d 652, 92 S.Ct. 594 (1972)), where the Supreme Court held that no matter how "inartfully pleaded"

> "(w)e cannot say with assurance that under the allegations of the pro se complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle heim to relief.' Conley V. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed2d 80 (1957). See Dioguardi V. Durning, 139 F.2d 774 (CA2 1944)." (Id. at 92 S.Ct. p. 596, emphasis added).

It should be noted that the government counsel correctly states that the appellant, in this Court, has abandoned his demand for a speedy trial at which he may prove his innocence. The appellant has abandoned this demand for twor reasons: (1.) This Court cannot order the government to bring a particular case to trial, it can only impose the sanction of dismissal upon the government's failure to do so; and (2.) the appellant has already been denied a speedy retrial, and since time runs forward rather than backward, it would be impossible to now give him a speedy retrial.

It should also be judicially noted that this appeal is not moot and that this Court has jurisdiction of the subject matter. See 28 U.S.C., Sec. 1291:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States,....." (Emphasis added).

Article III, Sections 1, and 2, of the National Constitution grants this Court the power to review this present case. As was so cogently articulated by Justice Story in Martin V. Hunter's Lessee (1 Wheat. 304, 4 L.Ed. 97 (1816)):

> "The appellate power is not limited by the terms of the third article to any particular courts. The words are, 'the judicial power (which includes appellate power) shall extend to all cases,' &c., and 'in all other cases before mentioned the supreme court shall have appellate jurisdiction.'" (Emphasis in original)

Though the Supreme Court has consistently maintained that it is "without power to decide moot questions," (St. Pierre V. United States, 319 U.S. 41 (1943)), it has become more reluctant to find mootness, especially in criminal cases. The St. Pierre case was dismissed because the petitioner had completed serving his sentence; but, beginning with Fiswick V. United States (392 211 (1946)), the Supreme Court reached the merits when it perceived significant collateral consequences from the conviction, though the sentence had been served. By 1968, in Sibron V. New York (392 U.S. 40 (1968)), the Supreme Court was compelled to recognize that the "collateral consequences" exception to St. Pierre had been expanded "to the point where it may realistically be said that inroads have

have been made upon the principle itself." Interestingly enough Chief Justice Warren noted that the Court had "acknowledged the obvious fact of life that most criminal convictions do in fact entail adverse collateral consequences."

The obvious "collateral consequences", squarely posited before this Court, is whether the government can keep the Sword of Damocle's suspended over the appellant's head indefinitely, notwithstanding Rule 6 and the Sixth Amendment. This is the real case and controversy herein. The government's counsel seems to think that they can. To this end they submit a sworn assurance to the court below that the appellant will never be retried on Counts Eight, Nine, and Ten. Evidently this sworn affidavit was not worth the paper it was written on, as they now adopt the position that there is a possibility those counts could "be resuscitated before the extinguishment by the statute of limitations" (Reply Brief, p. 6). The fact that the government fails to contend in this Court that its former sworn assurances below are still binding is indicative that the government will opportunistically make any allegation that is expedient to achieve its current objective, with little or no regard to actually adhereing to its word.

Having thus journeyed through the government counsel's Reply Brief and, in particular, the narrow/confused view adopted therein, the appellant respectfully calls upon this Court to correct a basic flaw that emanated from the lower court's failure in not

affording a remedy to the invocation of a proper formula, i.e., due process of law as made enforceable via the Sixth Amendment and Rule 6.

CONCLUSION

For the foregoing reasons the appellant respectfully prays that the order appealed from be reversed with instructions to dismiss Counts Eight, Nine, and Ten, "with prejudice".

Respectfully submitted,

Herbert Sperling

Herbert Sperling #78271
Defendant-Appellant, pro se
PO Box PMB
Atlanta, Georgia 30315

AFFIDAVIT OF SERVICE BY MAIL

STATE OF GEORGIA)
) SS:
COUNTY OF FULTON)

HERBERT SPERLING, after being duly by law sworn, deposes and says; that on this 16th day of January, 1976, he mailed instant copies to the U.S. Attorney for the Southern District of New York. All of which should constitute sufficient proof of service.

Yours etc.,

Herbert Sperling

Herbert Sperling #78271

Sworn to before me this
16th day of January, 1976.

Parole Officer: Authorized by the Act of July 7, 1955 to Administer Oaths (18 U.S.C. 4004).

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Office of the Clerk
UNITED STATES COURT HOUSE, FOLEY Sq.
NEW YORK, N.Y. 10007

Date AUG [illegible]

HERBERT SPERLING
BOX PMB
ATLANTA Ga 303 5

TITLE : U.S.A. -v- Sperling

DOCKET NUMBER : Pro Se 73 crim 441

DECISION DATE : July 24,1975

JUDGE : MacMahon

Sir

THERE IS ENCLOSED HEREWITH A COPY OF A DECISION FILED AND ENTERED IN THE ABOVE ENTITLED PROCEEDING .

Very Truly Yours

RAYMOND F. BURGHARDT

By Joel Blum

Deputy Pro Se Clerk

c.c.

Paul J. Curran
U.S. Attorney S.D.N.Y.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

EXHIBIT B

NO. 73-Cr-441

UNITED STATES OF AMERICA,

v.

HERBERT SPERLING,

DEFENDANT.

NOTICE OF APPEAL

Notice is hereby given that HERBERT SPERLING, DEFENDANT (defendant) (petitioner) (plaintiff) above named, hereby appeals to the United States Court of Appeals for the SECOND Circuit from the order (from the final judgement) (from the order (describing denying the defendant's pro se motion to vacate a prior order of the lower court granting the prosecutor's ex parte motion to nolle prosse three reversed counts, and to amend the order to read dismissed with prejudice

entered in this action on the 24th day of July, 19 75.
But which, however, was mailed to the defendant on August 12, 1975.

This 19th day of August, 19 75.

TO: U.S. Atty

DEFT. SPERLING
BOX PMB # 78271
U.S. PENITENTIARY
ATLANTA, GA 30315

Herbert Sperling

Box PMB - #78271
United States Penitentiary
Atlanta, Georgia 30315

J B Shaw Jr 8-19-75

Parole Officer: Authorized to administer oaths under the provisions of 18 USC 4004

Parole Officer: Authorized by the Act of July 7, 1955 to Administer Oaths (18 U.S.C. 4004).

Deft.